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FANBORN v. P.A. THE LAND OF GOVT, OF PARLIAMENT AND OF JUDICIARY



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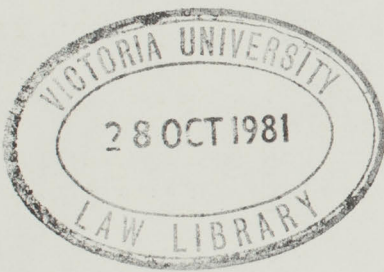
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INTRODUCTION

New Zealanders, in keeping with their counterparts elsewhere in the western world, are taught at an early age to be proud of the representativeness of their parliament, the impartiality of their judiciary and the security of their

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INTRODUCTION

New Zealanders, in keeping with their counterparts elsewhere in the western world, are taught at an early age to be proud of the representativeness of their parliament, the impartiality of their judiciary and the security of their freedoms ensured by the enforced separation of these bodies.

This paper is not an attempt to undermine such pride or to imply that these hallmarks of our democracy are either undesirable or ineffective. It seeks rather, with reference to the Trespass Act 1980, to suggest that a legislative paradox must necessarily flow from this type of structure - that the roles of government, parliamentary opposition and the courts are so fundamentally different that legislation is promoted, criticised and interpreted in accordance with divergent rather than common perspectives.

Government has created the Trespass Act 1980 to protect developed, agricultural land. The parliamentary opposition has served as the nucleus for a spirited criticism of the Act in order to protect undeveloped and unoccupied rural backblocks. Finally the courts have interpreted the Act to protect landowners in urban areas.

The Common Law Background

The interests in quiet enjoyment and exclusive use of land are the oldest interests recognized and protected by the Common Law. In safeguarding these interests Common Law trespass has evolved as a tortious civil action where the mischief is actionable per se and where the plaintiff must be in possession¹ of the land. The owner or occupier therefore, must prove to the court that the defendant on a balance of probabilities did in fact trespass in which case there is liability and the court will award damages giving due consideration to the circumstances of each case.

The award of such damages constitutes a practical restriction on the absolute nature of Common Law trespass. If a hiker quite innocently mistakes his way and strays onto a farmer's land causing no harm whatsoever, he is still liable in a trespass action but the damages awarded to the occupier or owner of the land would be nominal.² Where harm is caused by such trespass, to land, goods, structures or stock then the defendant is liable for the cost of that harm.³ The farmer may also recover prospective damages whenever the actions of the trespasser concern some advantageous use of the land, such as hunting. In such situations the plaintiff can claim an amount similar to what he would have received had some agreement been reached between the parties allowing the trespasser to pursue that particular activity. In addition to the award of damages, the court has the power to issue injunctions prohibiting the defendant from certain future acts, such as returning to the area or renewing or obtaining a hunting licence.

The fact that Common Law trespass is actionable per se naturally means that an action may be brought against any trespasser whether or not he can be described as a 'wrongdoer'. However, it is worthy of note that the continuation of the invasion is regarded as a new and separate wrong which suggests that at Common Law the court will treat those trespassers who fail to leave after being warned to do so, somewhat more severely.

The defences available to the trespasser at Common Law are consent (express or implied),⁴ justification⁵, necessity⁶ and perhaps inevitable accident. Mistaken entry onto land or absence of intention to trespass are no defence unless the facts are such as to bring the case within inevitable accident.⁷

A detailed case by case analysis, tracing the piecemeal development of Common Law as it relates to trespass on land, is not called for in this paper. However, it must become

increasingly obvious to anyone who engages in such a task, that the Common Law has evolved to cope with disputes arising in urban settings and incidents of rural trespass have played singularly little part in shaping or defining trespass at Common Law.

The Trespass Act 1968

Against this common law background the Trespass Act 1968 was introduced.⁸ The battle lines were remarkably similar to those that were to take shape twelve years later. The farmers formed the driving force behind the legislation with a National Government most sympathetic to their view point. The Deerstalkers Association, Tramping and Mountain Clubs, Scenery Preservation Society and Council for Civil Liberties were those groups loudest in their criticism and a Labour opposition represented their stance in parliament. So too was the issue essentially the same as that debated in 1980. Where should the balance be struck in weighing the interests of farmers and landowners against those of nature lovers and sportsmen?

The farmers demanded the same trespass provisions as those available to the Crown⁹ which made trespass ipso facto an offence and punishable by imprisonment. They also claimed that the present law catered in a biased manner for the needs of the urban dweller.¹⁰ The Government for their part maintained that the new Act could not be based on the statute applicable to Crown land as it was certain that some unreasonable farmers would abuse such an all embracing trespass provision. They insisted that a 'double mischief' element must be incorporated into any new statute.¹¹

Apart from this refinement of the farmers' requests, all their other suggestions seem to have been adopted. The Statutes Revision Committee, comprised of members from all three parties,¹² modified the original Bill but the influence of the farming

community was such, that the Government overturned their recommendations and reinstated section 6 relating to the discharge of firearms and section 8 relating to the obligation to give name and address.¹³

The parliamentary Opposition aggressively attacked proposals that contradicted the decision of the committee but did so more on the basis that the Government was abusing traditional parliamentary procedure than in terms of how the reinstated provisions might adversely affect the rights of other New Zealanders.

OF GOVERNMENT

It causes little surprise therefore to learn that the Trespass Act 1980 can trace its origins to a widespread desire on the part of the farming community to be better protected against thoughtless and occasionally malicious trespass. Such discontent manifested itself shortly after the passing of the 1968 Act but it was not until this general concern was translated into specific suggestions for reform that the Trespass Act in particular came up for consideration.¹⁴

The Tussock and Grassland Review

¹⁵
The Hon. Mr Geoffrey Palmer, M.P. contends that these more specific reforms were first voiced by the legal adviser to the Federated Farmers, Ruth Richardson, in an article which appears in the May issue of the 1977 Tussock and Grassland Review. More probably, the seeds originally sown by the failure of certain provisions in the Trespass Act 1968 took on their more definite form in a 1974 National Party caucus committee report on noxious animals and Ms Richardson's article marks their growth rather than their planting. Certainly however, the three areas of proposed reform described in that article were all incorporated

into the new act and as such Ms Richardson's commentary may be regarded as indicative of the prevailing farming attitude which became the driving force behind the passing of the Trespass Act 1980. The three areas consisted of procedure, range of penalties and range of offences and called particularly for the police rather than the farmer to pursue trespass offences, for increased fines and for the addition of stronger 'warning off' clauses. Highlighted also was the necessity to maintain a balance between the interests of the landholders and the interests of those who wished to roam the countryside, probably best achieved by refusing to penalise trespass per se and continuing to demand some form of double mischief test before the provisions of the act could be implemented. The article concludes, "Effective trespass control requires fit farmers, responsible public, adequate law and a strict application of the law by the judiciary", which comes as a pleasing indication that the author at least does not see a new trespass act as some miraculous and ultimate solution to the farmers' difficulties.

The Differences Between the Trespass Act 1980 and that of 1968

Further evidence as to the guiding forces behind the Act may be obtained in retrospect by examining what differences there are between the Trespass Act 1980 and its 1968 predecessor. They are as follows -

Section Two - This section deals with definitions and there are two differences worthy of note. 'Disturb' was defined in 1968 as 'to an extent which is likely to cause harm to the animal or inconvenience to the person who owns it or is in charge of it'. Now the definition reads, 'to an extent that causes harm to the animal or material loss or material inconvenience to the person who owns it or is in charge of it'. This new wording is one of three instances where the test demanded by the present legislation

is less easily satisfied than that of 1968. Actual harm to the animal must be shown rather than a likelihood of harm and the owner or controller must now suffer material loss or inconvenience rather than mere inconvenience. Sub section (2) of this section states that where land is unoccupied the owner for the purposes of the statute is deemed to be the occupier. This may well be no more than a point of clarification as arguably the owner could have been so deemed even in 1968¹⁶ but nevertheless deserves mention given the established common law rule that one must be in possession in order to bring an action for trespass.

Section Three - This provision, relating to 'trespass after warning to leave', has omitted the word 'wilfully' immediately before the word 'trespass'. It became the focal point for much of the criticism launched at the new act and yet it is difficult to conceive that trespass after such a warning could be anything but wilful except in the rarest of circumstances.¹⁷

Section Four - This section relates to 'trespass after warning to stay off'. It goes further than the 1968 Act in that warnings may now be issued when there is reasonable cause to suspect likelihood of trespass, and also grants the court the power to administer such warnings to persons convicted of trespass offences.¹⁸

Section Six - This provision substitutes the word 'weapon' for 'firearm' but as 'weapon' is defined somewhat more narrowly by the act than it would be at common law this change is of no practical significance.¹⁹ A more important difference is the deletion of the specific 1968 section (section 6) relating to discharging a firearm, that offence now being within the ambit of the more general provision of disturbing by means of weapon. Given the more demanding definition of 'disturb' in the new

legislation it could be maintained that this too is an instance of the 1980 Act being less restrictive than its 1968 counterpart.

Section Seven - Section 7 of the 1980 Act concerns the laying of poison and the setting of bait and has no equivalent provision in the 1968 Act.

Section Eight - This section invites an interesting comparison. Dealing with the state of open, shut and fastened gates, the 1968 Act provided that every person commits an offence who 'wilfully trespasses on any private land, and opens and leaves open a shut gate, or unfastens and leaves unfastened a fastened gate, on or leading to any land used for the farming of domestic animals'. The 1980 section however states 'Every person commits an offence who trespasses on any private land and wilfully (i) Opens and leaves open a shut gate or (ii) Unfastens and leaves unfastened a fastened gate or (iii) Shuts and leaves shut an open gate'. The former section prosecutes wilful trespass even if the gates were left open innocently while the latter prosecutes innocent trespass but only if the gates were left open wilfully. This difference marks the third instance where the 1980 Act takes the less severe approach. After all it is conceivable that under the old provision some hunter, camper or climber might wilfully be trespassing, albeit with all due care, and through some oversight, neglect to close a gate thus being liable under the 1968 Act.²⁰ Such is no longer the case and it is difficult to imagine any circumstances where a person who wilfully neglects to close a gate deserves the law's protection.²¹ In addition section 8 provides for leaving open shut gates not included in the earlier Act. Paragraph (b) is unique²² in that it does not require the ingredient of trespass for an offence to be committed either in the old or new Act. It concerns changing the nature of open,

shut and fastened gates with intent to cause loss, annoyance or inconvenience, previously under the 1968 legislation, loss, annoyance or harm. While there is no doubt the term 'inconvenience' is considerably easier to breach than the word 'harm' it is still difficult to see how this section is more restrictive. After all any action intent on causing inconvenience is undoubtedly already well within the bounds of intent to annoy.²³

Section Nine - Section 9, dealing with an offender's obligations to give information, while worded differently has much the same practical effect as the 1968 Act. The major change is that the police are specifically empowered to make such enquiries. Under the 1968 legislation, where there was no such authorisation, the offender was not obliged to answer any questions from the police.²⁴

Section Ten - This section incorporates the Act's most important procedural difference allowing the police to lay informations as well as the occupier.²⁵

The Need to Protect Developed Agricultural Land.

An appraisal of these variances between the two Acts and an understanding of the prevalent farming attitudes towards the question, combine to provide an insight as to exactly why the Trespass Act 1980 was passed. The more cynical might comment that it was an ill-conceived and entirely cosmetic attempt to pacify the farmers which given the traditional voting base of the National Party was a political necessity. Depending on one's political persuasion this view may appear attractive but it is submitted that such reasoning represents an over simplification of the issue. New Zealand still remains predominantly a primary produce nation and this continuing fact serves as a reminder that the well being of farmers and the well being of the nation is inextricably tied together. Also it would be unrealistic to

suggest that the farming community would go to such lengths to bring about specific changes in the law if it did not share a genuine concern that the present law in those areas was inadequate. The Trespass Act 1980 then, was not merely a political stratagem on the part of a vote catching government. It involved a very real desire to protect the land of the farmer more completely.

The links between the difficulties experienced by the farmers and the answers offered by the Government are easy to see. The farmer need no longer go through the time consuming task of civil procedure and now, thanks to section 10, has the benefit of the police to ensure that the perpetrators are prosecuted. The provisions themselves have been expanded to ensure that all abuses can be actioned and once the trespasser has reached court the increased fines and lengthened 'warning off' periods act as a more effective deterrent for the action not to be repeated.²⁶

In retaining the 'double mischief' test the government is mindful of the rights of others and attempts to steer their new legislation in the direction of the wrongdoer rather than towards the law abiding citizen.

The land deserving of such protection is private, developed and for the most part occupied land. The overriding concern is to safeguard those areas that are fenced and those areas carrying domestic stock where transgressions may result in economic loss. The persons the Act is designed to safeguard against are not just trespassers, but trespassers who fail to leave after being warned to do so, trespassers who enter after being warned not to, trespassers who wilfully disturb domestic animals and trespassers who wilfully leave gates in a manner different to which they found them. In short the Act was passed to protect farmers against wrongdoers.

A Criticism

However a criticism as to priorities may still remain. The Government in promoting this Act and including all those reforms suggested by the farming community placed insufficient emphasis on whether enforcing the Act through the courts would remove the mischief, failed to make a studied reconciliation of the new legislation with existing statute and common law and placed too little importance on the Act's utilisation in areas of trespass outside rural locations.

The Trespass Act 1980 will no doubt play its role in assisting landowners to overcome their trespass difficulties but the two most urgent problems confronting farmers must remain that of preventing 'mistaken' trespass and apprehending the malicious offender. Despite this, there has been no attempt by the Government to raise the standard of rural mapping, improve signposting, offer assistance to the farmer in boundary marking and fencing or educate the public to make them more aware of the farmers' difficulties. As regards apprehension of the offender, the foremost requirement is manpower which both the police and the farmer can ill afford. Legitimate sportsmen, as the Deerstalkers Association have already suggested,²⁷ often provide the most effective scrutiny of back country areas. If the Government had been instrumental in reducing the antagonism between the farmers and such groups, perhaps a scheme somewhat akin to a rural 'neighbourhood watch' could have been developed. The more restrictive legislation now exists but without action in these other spheres its enforcement may serve little purpose.

Noticeably the Government has viewed the whole matter from a farming perspective and has been unwilling to look further than the confines of the Trespass Act. A review of the legislation relating to Crown land and National Parks²⁸ would

have been instructive in determining whether such areas may be made more readily accessible to the public, thus relieving the pressure on farming land. So too did the Crimes Act²⁹ bear closer study as regards a possible amendment to include trespassers who damage property or disturb stock. Certainly that would have facilitated an easily observable distinction between 'innocent' and 'criminal' trespass. Such an overview, reconciling all law that may affect the particular arena of concern, was not undertaken.

In addition, as shall be demonstrated later in this paper, judicial experience in the actual use of the Trespass Act was not an issue that the Government chose to consider.

OF PARLIAMENT

The Opposition in Principle

The nationwide opposition to the Act was spirited and at times intense. Necessarily spearheaded by the Opposition party in parliament the major concerns raised in that forum were as follows:³⁰

1. The Act was unnecessary - the farmers were adequately protected already by the existing Trespass Act and a range of alternative legislation.³¹ There was a need to reduce 'red tape' and to prune the statute books both of which the 1980 Trespass Act did nothing to assist.
2. The Act was unduly oppressive as it threatened the rights of all New Zealanders in an effort to control a very few hooligans.
3. The Act was politically dangerous in that it fitted very neatly into a larger government pattern of pandering to the interests of big business at the expense of the individual, and of giving ever increasing power to the police.

4. The Act tilted the balance too far in favour of the landowner transferring the cost and trouble of protecting property away from the owner onto the community.
5. The recreational point of view was being ignored.

Underlying these specific concerns was the general feeling that the Act threatened Labour's ideology. The social factors involved were being given too little consideration in the haste to find a solution to an economic problem.

The Submissions

Twenty nine submissions were received on the Trespass Act and almost half were specifically directed at putting forward the recreational point of view.

Breakdown of 29 submissions received

Nature, sporting and outdoor groups	Other groups	Legal	Individuals
14	5	2	8

Those 'outdoors' orientated groups presenting the most considered submissions were

Federated Mountain Clubs of N.Z.

Council of South Island Acclimatisation Societies

Royal Forest and Bird Protection Society of N.Z.

N.Z. Deerstalkers Association

N.Z. Federation of Rifle, Rod and Gun Sportsmen.

While the specific objections raised by each of these groups may have varied slightly in accordance with the particular recreational pursuit they were trying to protect, the general area of concern was of preserving the readily available access to natural and undeveloped areas that New Zealand is renowned for. The overall accent was quite clearly, that while the

property of farmers had to be protected so too did the rights of legitimate, careful sportsmen and nature lovers to gain access to those areas best suited for their pastimes and once there to reasonably enjoy their interests without threat of criminal sanction. There was also the wider idea that New Zealand had always been a country unhindered by superficial class barriers distinguishing those who owned land from those who did not and free of any tensions between urban and rural dwellers. It was stressed that this harmonious atmosphere must be retained which could only be achieved if rural backblocks of native bush and natural countryside were freely available to those who did not own the land and those who did not live in such areas.

The individual submissions were mainly from individual farmers or sportsmen reflecting the same interests as the related larger organisations.

The legal submissions directed themselves to particular legislative ambiguities, inconsistencies and loopholes, warned of detrimental results and suggested alternative phrasing to overcome the difficulties.

'Other Groups' were composed of:

Federated Farmers

Auckland City Council

Federated Road Transport Organisations of N.Z.

Family Need Fathers Society

New Zealand Council for Civil Liberties.

The submissions of Federated Farmers were in keeping with their general desire for reform, discussed earlier in this paper. The Council for Civil Liberties was mostly concerned with the balance of conflicting rights between landowners and

the individual. It maintained that the balance had swung too far in favour of the landowner but did not go as far as the parliamentary Opposition to suggest this formed some part of an overall Government plan to oppress individual rights.

The three other groups were interested in how the 1980 Trespass Bill would affect those areas of trespass outside rural locations - a difficulty seemingly glossed over by the Government, reduced to a secondary consideration by the Opposition and yet, in terms of the day to day utilisation of the Act by the courts and the police, of vast importance.

The Need to Protect Free Access to Native Forest

In the light of these submissions it is clear that the parliamentary Opposition's five pronged attack on the Trespass Act was backed by substantial nationwide concern. The more cynical might comment that the Labour Party merely made opportunist use of this genuine concern to once again expose the Government as oppressive tyrants and hail themselves as the guardians of freedom for the 'ordinary bloke'. Such however is too shallow a view.

The task of the Opposition is to act as a parliamentary watchdog and in a more realistic political sense to oppose government and offer the electorate an alternative stance. In a situation such as the Trespass Act 1980, where widespread disquiet amongst the general public manifested itself, it was only proper that the opposition act as a nuclear and unifying agent for those people. As already stated half the submissions reviewed related to 'the loss of the outdoors' and it was this interest that the Labour Party championed.

The land labelled as in danger of being lost to the individual was for the most part, unfenced, unstocked and unoccupied. The persons the Act was endangering were legitimate hunters, campers, hikers, sportsmen and nature

lovers who wished to pursue their leisure pastimes with due care and consideration for the owners and occupiers of the land concerned. In short the Act was opposed to protect law abiding citizens against malicious farmers armed with a harsh and unrelenting law.

A Criticism

However, a criticism as to emphasis may still remain. The Opposition in concentrating on 'individual freedoms' devoted most of their time and energy to how the Act might adversely effect the ordinary New Zealander. They proposed no alternative resolutions to the farmer's problem nor initiated any suggestions to better safeguard the needs of the sportsman and nature lover. In this regard closer appraisals of the following legislation may have been appropriate: ³²

The Wild Animal Control Amendent Act 1979

The Crimes Act 1961

The Arms Act 1958

The Police Offences Act 1927

The Land Act 1948

The Reserves Act 1977

The Walkways Act 1975

Certainly the Opposition mentioned some of this legislation as indicative that a new Trespass Act would be superfluous but a more studied review on the adaptability of these measures to counter the mischief and promote free access to back country areas, was not forthcoming. The Opposition contented itself with finding fault in the Governments proposed solution and saw no need to offer counter suggestions of how the trespass problem or the needs of the 'outdoors lover' could be better provided for.

Also the Opposition made only passing reference to the Act's utilisation in areas of trespass outside rural locations.

Three of the submissions outlined this sort of difficulty. The Federated Road Transport Organisation of New Zealand recommended that sections 5, 5, and 9 of the Trespass Bill be extended to include passenger service vehicles. This was because the drivers of passenger vehicles were subjected to similar sorts of abuses from the public as land owners (especially shop keepers) but had little means of taking action against the perpetrators.

The Families Need Fathers Society (N.Z.) inc. were concerned that as Section 3 of the bill removed the 'Cunard'³³ defence, fathers visiting their children who believed their licence to do so was improperly revoked would have no answer to a trespass action.

The submissions from the Auckland City Council began 'The Bill refers in the main to rural areas and is of little help with regard to actions occurring in urban areas.' The specific concern of the Council was an attempt to include in the Act trespass by motor vehicles (and their drivers) on private land which appeared to be a growing problem in the Auckland area.

The individual validity of these three submissions is unimportant but they serve as an indication of the extremely wide reaching affect the Trespass Act 1980 may have. The current utilisation of the Act in the Springbok Tour controversy provides another example.³⁴ A more detailed examination of the court's experience in the use of the Trespass Act 1968 would have provided the Opposition with a far better insight as to what results the new Act was likely to produce.

OF THE JUDICIARY

New Zealand Cases Between 1968 and 1980

Apart from the obvious task of implementing and continuing to evolve the common law the courts also play a substantial role in actually determining the precise meaning of statute. Since the passing of the Trespass Act 1968 there have been six reported instances of the courts performing this function.³⁵

Possibly the most important of these is the case of Police v Cunard.³⁶ A mildly drunken hotel patron refused to leave the bar when asked to do so and was prosecuted under Section 3³⁷ of the Act as a result. The court upheld his appeal on the grounds that his trespass lacked the necessary element of wilfulness, the rationale being as follows. The appellant genuinely believed he was not drunk and even though he was mistaken in this belief it followed that he genuinely believed his licence was being improperly revoked. As such he was unknowingly trespassing or trespassing without the will to do so. However, Speight J. went on to temper this decision by stating that such a defence could only be used in questions relating to the propriety of the revocation as regards disputed facts, not issues of law, and suggested that there would be occasions when the belief genuinely held by the defendant could not be supported by the circumstances.

The case of Police v Shadbolt³⁸ arose in connection with this decision. The appellant insisted on obtaining certain information at the headquarters of St. Johns Ambulance and refused to leave until such time as he received it. He was convicted under section 3 of the Act and appealed in accordance with the 'Cunard' defence. The court held that any genuine mistake that may have been made in the mind of the appellant did not relate to a factual situation.

Decided in 1970, prior to the decision in *Cunard* was the case of Duffield v Police³⁹ and it is interesting to speculate in light of these subsequent cases whether a similar defence could have been raised to assist Duffield. Once again the prosecution had taken place under Section 3 with the following fact situation. A protestor had attended a golf game between Gary Player and Bob Charles and although it was not known whether he had purchased a ticket it was assumed by the Court that he had. The protestor was asked to leave after he had obstructed the fairway thereby preventing play for some minutes. His action was held to be wilful trespass. The basis for the decision was that any licence to enter onto land (i.e. the buying of the ticket) impliedly demanded an orderly manner of behaviour which the carrying of placards and the delaying of the match immediately breached. The appellant's licence therefore had been legitimately revoked when the golfing official asked him to leave and his refusal to comply with that request constituted wilful trespass.

It would appear that under the '*Cunard*' defence the appellant could make a strong case for suggesting, that whether his behaviour was disorderly or not, was a question of disputed fact. He could argue that he genuinely believed his licence was being improperly revoked, and such a belief could be supported by the circumstances in that all he was doing was exercising his democratic right to protest.

Whether or not the court would have accepted this view is arguable but it is unnecessary to speculate further here. Section 3 of the Trespass Act 1980⁴⁰ omits the word 'wilful' thus specifically circumventing this very defence.

There is one further case that relates to Section 3 albeit concerning a different issue. The case of Chisholm v Police⁴¹ was also a case involving the Maori protest of land rights at Bastion Point. The court held, that the term 'owner' in Section 3

was not restricted to an owner in occupation and also that an ephemeral trespasser who had occupied the land for some months gained no additional rights to protect him from the provisions of the Trespass Act.

The only other section to have come before the courts for closer interpretation in a reported case is Section 8 (3) ⁴² in Chalklen v Kirk.⁴³ This case concerned a deer hunter giving false particulars to a farmer where the court held that substantial compliance with the necessary procedure was enough and that the trespasser would not succeed in his appeal by relying on minor technicalities. It is interesting to observe that this section too has been expanded in the 1980 Act.

Trespass Offences in 1980

An analysis of the police statistics relating to trespass offences for the calendar year of 1980 provides clear evidence that the Trespass Act 1968 was predominantly used to deal with urban situations.

Scene of Crime Analysis - Period 01/01/80 to 31/12/80 Inclusive⁴⁴

Total offences under the Trespass Act 1968 throughout New Zealand.

Total	Bk.	Dwel.	Educ.	Fact.	Gara.	Hosp.	Offic.	Liqr.	Medi.	Shop.	Publ.	Other
1639	3	618	39	14	1	28	23	131	1	34	113	634

Any trespass abuses occurring on farming land would be included within the 'other' grouping which constitutes approximately 39% of all offences under the Act. Unfortunately the exact size of this rural component is impossible to determine. However a breakdown of the statistics relating to the Christchurch area, into rural and urban police stations is instructive.

Urban Stations	Total	Other	Dwelling	Hospital	Shop	Public Place
Addington	1	-	1	-	-	-
Ashburton	1	-	-	-	-	1
Headquarters	83	67	10	1	-	5
Hornby	6	3	1	-	-	2
International Airport	-	-	-	-	-	-
Kaiapoi	2	2	-	-	-	-
Lyttleton	1	1	-	-	-	-
New Brighton	11	8	3	-	-	-
Papanui	17	12	3	-	2	-
Riccarton	-	-	-	-	-	-
St. Albans	-	-	-	-	-	-
Sumner	3	3	-	-	-	-
Sydenham	-	-	-	-	-	-
Woolston	1	-	1	-	-	-
	<u>126</u>	<u>96</u>	<u>19</u>	<u>1</u>	<u>2</u>	<u>8</u>

Rural Stations

Amberly	-	-	-	-	-	-
Akoroa	-	-	-	-	-	-
Burnham	-	-	-	-	-	-
Culverden	-	-	-	-	-	-
Cheviot	1	1	-	-	-	-
Dorfield	2	1	1	-	-	-
Hanmer	-	-	-	-	-	-
Lincoln	-	-	-	-	-	-
Leeston	-	-	-	-	-	-
Methren	-	-	-	-	-	-
Oxford	-	-	-	-	-	-
Rakaia	-	-	-	-	-	-
Rangiora	-	-	-	-	-	-
Waikori	-	-	-	-	-	-
	<u>3</u>	<u>2</u>	<u>1</u>			

The Christchurch area was chosen because it has an equal number of urban and rural stations. On the assumption that it is most unlikely that a rural trespass offender would be dealt with at an urban station, then only 3 of 129 offences under the Act could have occurred on farming land. Even one of those, we know to have taken place inside a dwelling. Subject of course to the validity of this assumption, in Christchurch last year only 1½% of offences under the 1968 Act concerned the type of mischief the 1980 Act was passed to prevent.

An overview of all trespass offences (not merely those under the 1968 Act) gives a similar result.⁴⁵

	Christchurch Area	
	Total	Other
Urban Stations	964	796
Rural Stations	34	16

Once again the 'other' component of the rural stations constitutes only 1½% of total trespass abuses.

Even if the 'other' group at urban stations does include a proportion of trespass that relates to farming and back country locations it would still seem inescapable that the trespass mischief is predominantly an urban problem and consequently that the Trespass Act 1980 will for the most part deal with non-rural trespass offences.

The Need to Protect Non-Rural Areas

It must be immediately apparent that out of the six reported cases mentioned earlier, only one is in an agricultural setting with an offence typical of the mischief the 1968 Act was passed to correct (Chalklen v Kirk). Given the parliamentary background of the 1968 Act it would be fair to suggest that while the provisions of the Act itself were shaped by the need to afford better protection to the farmer, the subsequent interpretations and constructions of those provisions, that

necessarily must flow from the courts, have been shaped by considerations relating mainly to the non-farming owner or occupier.

Further, the ongoing utilisation of the Act dealing with the everyday offences that raise no doubtful question of law and are unlikely to be appealed, reflect a similar emphasis. The effectiveness of the 1968 Act must be measured in how efficiently it can deal with the ordinary urban trespasser.

It is a shame that given this situation the parliamentarians in 1980 were not able to create an Act which placed more importance on judicial reality and less on the political forces calling for their attention.

CONCLUSION

There can be little argument that rural trespass causing economic loss to farmers, either through negligence or malice is both frequent and serious. In any organised society where the state assumes responsibility for the maintenance of law and the control of crime it is only proper that government should intervene to abate such a problem. In so doing it would be naive to expect them to ignore the harsh realities of politics and it is therefore understandable how eager a National Government might be to assist the farmers in their plight. To this end the Trespass Act 1980 was passed.

Several significant changes were made in the legislation in order to alleviate the growing trespass menace. Section 10 took the onus of bringing the offender to justice from the farmer and placed it with the police. Other sections instituted increased penalties and fines while section 3 removed a possible line of defence previously available to the defendant. Such alterations could hardly be termed cosmetic.

At the same time the Government retained the 'double mischief' requirement in order to offer some safeguard to the legitimate interests of sportsmen, trampers and other New Zealanders likely to enter back country areas.

In terms of a statutory overview section 12 ensured that where necessary relevant legislation was either repealed, amended or retained. Due consideration was given to the legal submissions in an endeavour to make the Act practical in law.⁴⁶

For their part, the Opposition fulfilled their role as representatives of those groups that were dissatisfied with the 1980 Trespass Bill. They quite rightly emphasised that if the Bill went ahead law abiding citizens might become subject to a criminal sanction. They suggested that there was already an abundance of legislation to assist the farmer and criticised that the responsibility for protecting land should be shifted from the owner of that land to the general public (via the police).

However the Opposition did not look at any positive measures for helping the farmers overcome their problems nor at any positive alternatives of how the rights of New Zealanders could be better preserved. The spectrum of consideration, just as for the government, was not to be enlarged outside the Trespass Act and was not to be seen from any perspective other than that of the pressure group to whom support had been offered. Our parliamentary structure demands such an approach. The Opposition must be critical not creative. They must expose the problems of the 'outdoors groups' which arise out of the government response to the farmers, without solving the problem of either the farmers or the 'outdoors groups'.

So too did the Government restrict itself to a narrow context defined solely by the proposals of the farmers. Similar trespass provisions may have been achieved, while still retaining a clear distinction between innocent and criminal trespass, if the Crimes Act has been amended. Such an option was not investigated. Additional amendments to the Land Act 1948 and Reserves Act 1977 could possibly have made alternative areas of native bush and natural countryside available to those groups most alarmed at the Trespass Bill. This consideration was ignored.

A further anomaly, as suggested throughout this paper, is that the common law representing a pragmatic piecemeal evolution of trespass law has been formed and defined by urban disputes. The New Zealand trespass statutes on the other hand have been structured and shaped to deal with farming disputes even though in practice they are hardly ever used to deal with offences in farming locations.

The Government has passed an Act to protect developed farming land from trespassers. The Opposition does not measure the success or otherwise of that Act in terms of whether it achieves this aim. Rather it opposes the Act because it does not protect undeveloped rural backblocks for sportsmen and nature lovers. The courts must use the Act to solve trespass problems on a day to day basis. They therefore see it from a view point dominated almost entirely by its urban application. Government, the Opposition and the Judiciary all perceive the Act from varying perspectives, adopt different criteria to judge its effectiveness and direct it to achieve divergent goals. This state of affairs does not arise out of some failure on the part of the National party, Labour party or the present Judiciary to understand their tasks. Rather they

have understood them too well.

The structure of the system within which they operate must be held responsible, in that all parties involved in legislation must necessarily be so with little basis for common ground or consensus.

The Government must creatively answer the difficulties encountered by various sections of the electorate. All the Opposition need do, is identify the ill effects arising out of the Government's proposals. Finally the Court is confronted with the reality of individual fact situations encompassing a multitude of diverse factors and far removed from the clearly defined ideals mooted in Parliament.

It is from this paradox that the Trespass Act 1980 suffers.

diminution in the value of the land' which is all the plaintiff is entitled to recover. Salmon on the Law of Torts Reiston, 1989.

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4. Express consent is actually allowing the defendant to enter onto the land where as implied consent involves granting the defendant certain rights or interests which as a result demand his entry onto the land. Such consent is termed licence. A bare licence can be revoked at any time by the owner or occupier of the land but a licence coupled with an interest cannot be revoked until the interest is extinguished.
5. Justification covers all those with a legal right to enter onto land, often so entitled by statute. Such persons as municipal utility inspectors and the police fall within this category.
6. Necessity allows for unauthorized entry onto land in emergency situations in order to save life or property etc.

1. A person is in possession of land if he is in physical occupancy or control of the land with the intention of exercising exclusive control; or if he has been in physical occupancy or control with such intent, and no other person has occupied it; or if he has the legal right to immediate occupancy and no other person has gained occupancy thereof.
2. Nominal damages are a small sum of money by way of recognition of some legal right vested in the plaintiff and violated by the defendant.
3. 'The measure of damages is not the cost of reinstatement - the cost of restoring the land to the condition in which it formerly was - a cost which may greatly exceed the actual diminution in the value of the land' which is all the plaintiff is entitled to recover. 'Salmon on the Law of Torts' Heuston, p559.
4. Express consent is actually allowing the defendant to enter onto the land where as implied consent involves granting the defendant certain rights or interests which as a result demand his entry onto the land. Such consent is termed licence. A bare licence can be revoked at any time by the owner or occupier of the land but a licence coupled with an interest cannot be revoked until the interest is extinguished.
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7. The defence of 'inevitable accident' is certainly valid as regards trespass to property and goods. The case of National Coal Board v J.E. Evans & Co.Ltd., (1951) 2 KB 861, where the driver of a mechanical excavator was held not to be liable for trespass when he damaged an underground cable, is authority for that. It would be strange if this defence did not apply equally to trespass on land. As such a trespasser who mistakenly enters land relying on an incorrect map may have a valid defence.
8. The Act specifically repealed (i) Section 6A of the Police Offences Act 1927; (ii) Section 3 of the Police Offences Amendment Act No 2) 1952; (iii) Section 103 of the Animals Act 1937. Necessarily all these statutes must also be seen as background to the Trespass Act 1968.
9. Those provisions available to the Crown appear in s176 of the Land Act 1948 as follows:
 - (2) 'Every person commits an offence against this Act who without right, title, or licence
 - (a) Trespasses on, or uses, or occupies lands of the Crown.
10. This claim could not be substantiated. Section 54 of the Police Offences Act 1927 - 'offence of being found on property without lawful excuse but not under circumstances disclosing criminal intent' applied equally as well to farm 'yards, buildings, gardens, or areas' as it did to their urban counterparts.
11. The 'double mischief' element is simply requiring something more from the trespasser than mere trespass before liability can be imposed. Failing to leave after being warned to do or causing harm etc. will suffice.

12. Social Credit had one member of parliament in 1968 and he supported the passing of the Act.
13. The Opposition objected to section 6 which prohibited the discharging of a firearm on, into or across any private land as it would effectively put an end to the sport of duck shooting. They also regarded section 8 as unnecessary and very probably inflammatory when given a confrontation situation between farmer and sportsman. Both sections did not appear in the Bill approved by the Statute Revisions Committee.
14. The Government had made some attempts to appease the farmers prior to 1980. The Noxious Animals Act 1956 was repealed by the Wild Animals Control Act of 1977 which curtailed the rights of hunters to seek out deer wherever they may in attempting to reduce the damage they caused. Also the Wild Animal Control Act was amended in 1979 and it was made an offence to hunt over land without the owner's consent.
15. Mr Geoffrey Palmer, M.P. for Christchurch Central, led the parliamentary attack on the Act.
16. The 1968 Act included no specific definition of 'occupier'. However the act throughout treats both owner and occupier as having the same authority and it would be a strange construction to suggest that where land was unoccupied the owner could not enforce his right to bring action for trespass.
17. This alteration was particularly objectionable to the opposition as it seemed to deliberately guide the Act away from a position where innocent trespassers were

- protected. In fact, a double mischief is still required, trespass and failure to leave, and the predominant reason for excluding the word 'wilful' is to remove the 'Cunard' defence - discussed later in this paper.
18. Under the 1968 Act the owner or occupier could only warn to stay off once a trespass had been committed. The new legislation allows such a warning to be issued if it seems someone is likely to trespass. It is improbable that such warning could be by means of a signpost as some kind of assessment is necessary to judge whether trespass is likely or not.
19. The definition of weapon in the Trespass Act 1980 is as follows:
' "weapon" means any gun, rifle, airgun, or air rifle and includes any kind of weapon or device from which any shot, bullet, arrow tranquilising dart or other missile can be discharged.' The definition of 'firearm' at common law and in other legislation (eg. Wild Animal Control Act 1977) is almost identical.
20. For example a duckshooter who wilfully enters a farmer's land to retrieve a duck he has just shot and in his excitement forgets to close the gate would be liable under the 1968 Act.
21. Any hunter or trapper who deliberately left open a gate is exhibiting a degree of thoughtlessness towards the farmer that deserves to be punished. If it was vital that such an act was necessary because of some emergency the trespasser would have a valid defence.

22. Definitely the action of trespass is not necessary to breach Section 8 (b). This implies that this section may be used to prosecute any person authorised to be on the land as well as any trespasser.
23. The Oxford dictionary definition of 'inconvenient' is 'awkward, troublesome'. The definition of 'annoy' is 'irritate, vex'. It would appear then, that an action bent on 'inconvenience' would also be one held to 'annoy'.
24. In theory at least there is no obligation in law for a member of the public to answer any questions asked by the police. In practice however, given the many statutory and common law exceptions empowering the police to ask for name and address, an offender might be unwise to refuse to answer.
25. This means that the farmer need no longer embark on the time consuming and complex task of bringing a civil suit against the trespasser. The police are now empowered to bring the action themselves.

26. The fines have been increased as follows:

	1968	1980
Warning to leave	s3 3 months imprison. or £200	s3 3 months imprison. or £1000
Warning to stay off	s4 £200	s4 3 months imprison. or £1000
Disturbance of stock	s5 £100	s6 1 month subs(a) £300 subs (b) £500
Discharge of firearm	s6 £100	refer above s6
Failure to shut gate	s7 £50	s8 £200
Obligation to give name and address	s8 £200	s9 £500

All the above fines or terms of imprisonment are the maximum that may be imposed. In addition the 'warning off' period in s4 has been increased from 6 months to 2 years. Also where the offence involves a firearm, the Crown under the 1980 Act has the additional power to confiscate the weapon.

27. The Association claimed that their members formed an experienced and disciplined group not blameworthy for the farmers' problems. In this capacity, they argued, they could be a valuable asset to the farmers in helping them police back country areas.
28. The total area of New Zealand is almost 27 million hectares of which 5.7 million hectares is Crown land available for lease or licence for farming or other purposes and 2.67 million hectares are set aside for national parks and public reserves. Of this vast area (almost one third of N.Z.) no particular location has been specifically designated for hunting. The National Parks Act 1952 could be amended to especially create areas suitable for the sportsmen involved to pursue their interest in a controlled environment. Also the Land Act 1948 could be altered to allow easier access to Crown land in general. The fact that trespass is actionable per se in such areas is not in keeping with the professed desire of both Government and Opposition to allow sportsmen and nature lovers as much freedom as possible to pursue their activities.
29. Section 52 of the Crimes Act 1961 concerns 'Defence of moveable property against trespasser'. The concept therefore, of specifying the act of a trespasser under a section of the Crimes Act is hardly novel. Also there is nothing new in imposing a criminal sanction on negligence (eg. Manslaughter) As such s298 of the Act relating to 'wilful damage' could have easily been expanded to include the wilful or negligent actions of trespassers that result in damage.

30. The opposition referred to consists only of the Labour Party. Social Credit supported the Act.
31. That legislation particularly mentioned by the Opposition was the Wild Animal Control Amendment Act 1979, the Crimes Act 1961, the Arms Act 1958, the Police Offences Act 1927 and of course the existing Trespass Act of 1968.
32. The purpose of mentioning these statutes (and previously the National Parks Act) is not to suggest that some ultimate solution to the trespass mischief can be found by changing their provisions. Rather they are mentioned to illustrate that the solution to the trespass problem need not be confined merely to existing trespass legislation but can also include taking positive measures in other areas. The Wild Animal Control Act, the Crimes Act, the Arms Act, and the Police Offences Act at present sanction many offences similar to those guarded against in the Trespass Act. Positive suggestions on how to amend that legislation may have become an attractive alternative to both farmers and Government. Both the Reserves Act and Land Act could be altered to adopt a less restrictive attitude towards public entry onto Crown land, and the Walkways Act is at present under utilised (only 32.3 km of walkways existed as at 31st December 1979) Amendments to these statutes may have helped alleviate the fear of legitimate sportsmen and nature lovers that rural areas were gradually becoming closed to them.
33. The details of the 'Gunard' defence are explained in the 'Of the Judiciary' section of this paper.
34. E.g. Students who entered the offices of the Auckland

Rugby Union to demonstrate against the tour were prosecuted under s3 of the Act.

35. One of these cases requires no further discussion. That is the case of *Viliami Ilolahia v Police* (decided in September 1980). It concerns a protester prosecuted for trespass at the Bastion Point protests relating to the ownership of Maori land, but the issue before the court was an evidentiary issue only.
36. *Police v Cunard* (1975) 1 NZLR 511
37. The relevant part of s3(1968) is as follows '..... who wilfully trespasses on any place and neglects or refuses to leave that place after being warned to do so by the owner or
38. *Police v Shadbolt* (1976) 2 NZLR 409
39. *Duffield v Police* (1971) NZLR 381
40. The relevant part of s3(1980) is as follows '.....who trespasses on any place and, after being warned to leave that place by an occupier of that place, neglects or refuses to do so.
41. *Chisholm v Police* (1978) 2 NZLR 612
42. Section 8 (1968) (3) 'Every person commits an offence and is liable on summary conviction to a fine not exceeding two hundred dollars who, being required under this section to give particulars of his name and address, fails to give those particulars, or supplies any false evidence with respect thereto.
43. *Chalklen v Kirk* (1970) NZLR 553

44.	Br.	Bank
	Dwel.	Dwelling
	Educ.	Place of education e.g. school, university
	Fact.	Factories
	Gara.	Garages
	Hosp.	Hospitals
	Offic.	Offices
	Ligr.	Hotels and other places that sell liquor
	Medi.	Medical locations other than hospitals
	Shop.	Shops (not including chemists)
	Publ.	Public places
	Other.	All other locations both rural and urban.

45. For the 1980 year only 19½% of all trespass offences were prosecuted under the Trespass Act 1968. The remainder occurred under such Acts as the -

Alcohol and Drug Addiction Act

Domestic Proceedings Act

Child and Young Persons Act

Civil Aviation Act

Government Railway Act

Penal Institutions Act

Land Act

Police Offences Act

All these Acts contain miscellaneous trespass provisions.

46. E.g. The submissions presented by A.L. Angelo and R.D. McInnes from Victoria University pointed out that the title of the 1979 Trespass Bill was a misnomer. There was no law to be consolidated and the Trespass Act 1968 was to be repealed not amended. In light of these submissions the title of the Bill was changed to the Trespass Act 1980 and was described as an 'Act to amend the law relating to trespass'.

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